

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

10 FELTON LOVE, JR.,

11 No. 2:23-cv-00790-DJC-EFB

12 Plaintiff,

13 v.

14 JEFF MACOMBER, KATHLEEN
15 ALLISON, TRACY JOHNSON, RICK M.
16 HILL, T. JOHNSON, J. HECKMAN, D.
17 HARRIS, O. DAVIS, C. HOUGH, E.
18 MEJIA, K. O'CONNOR, R. BARTON, J.
19 GELEIN, R. ROGERS, C. O'HAGAN, R.
20 VIERA, M. STRAND, M. MARTINEZ-
21 LUCATERO, G. WATERHOUSE, E.
22 AGUILAR, B. BICK, J. STILWELL, and
23 Does 1 thru 100.

24 Defendants.

**ORDER DENYING PLAINTIFF'S EX
PARTE EMERGENCY MOTION FOR A
TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

25 Plaintiff, a state prisoner proceeding through counsel, moves this Court on an
26 *ex parte* basis for a Temporary Restraining Order ("TRO") and Preliminary Injunction
27 enjoining Defendants from transferring Plaintiff to a Non-Designated Programming
28 Facility ("NDPF") pending final judgment in this matter ("Motion"). (Mot. (ECF No. 3) at
1.) For the reasons set forth below, Plaintiff's Motion is DENIED.

1 **I. Background**

2 Plaintiff filed a complaint in this matter on April 27, 2023, alleging Defendants,
 3 employees of the State of California Department of Corrections and Rehabilitation, are
 4 attempting, either willfully or negligently, to enforce an “underground regulation” by
 5 requiring Plaintiff to transfer to a NDPF; the complaint claims various constitutional
 6 and state law violations that have allegedly been caused by the attempted
 7 enforcement. (Compl. (ECF No. 1) at 5-9.) Plaintiff filed this Motion simultaneously
 8 claiming that he would suffer irreparable injury if enforcement of the “underground
 9 regulation” were permitted as Plaintiff, who is a documented Crip gang member,
 10 would be transferred to a NDPF which houses “debriefed”¹ Crip gang members who
 11 may view Plaintiff as a threat and assault him. (Mot. at 2; Decl. of Felton Love, Jr.
 12 (“Love Decl.”) (ECF No. 3-1) at 2.) Plaintiff also argues there is a substantial likelihood
 13 he will establish at trial that Defendants are acting with deliberate indifference to his
 14 Eighth Amendment right to be free from dangerous conditions and attacks from other
 15 inmates, that granting the Motion will serve the public interest, and that any harm to
 16 Defendants is outweighed by the injury threatened to Plaintiff.² (Mot. at 2.)

17 Plaintiff previously filed a complaint and motion for TRO and preliminary
 18 injunction before Judge Nunley in this district based on the same underlying set of
 19 facts and alleging the same constitutional and state law violations. See *Love v. Hill*,
 20 No. 2:22-cv-01233-TLN-AC, 2022 WL 17722351, at *1 (E.D. Cal. Dec. 15, 2022).
 21 Plaintiff’s motion was denied, and the court ruled the complaint failed to state a claim
 22 for relief, granting leave to amend. *Id.* Plaintiff’s subsequent first amended complaint
 23 was dismissed without leave to amend for failure to state a claim, and Plaintiff’s
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25 ¹ “Debriefed” gang members are those who “have snitched on the gang to the police and in exchange
 26 [] have received their own yard and privileges.” (Love Decl. at 2.)

27 ² The Court notes that Plaintiff references attached declarations, exhibits, and a memorandum of law
 28 which will allegedly support these arguments. (Mot. at 2.) No exhibits or memorandum of law have
 been filed with this Motion, which is supported solely by Plaintiff’s declaration.

1 request to amend the complaint a second time was denied because "Plaintiff's
2 proposed second amended complaint fail[ed] to state a claim for relief for the reasons
3 already articulated by the magistrate judge in screening the original and first
4 amended complaints." *Love v. Hill*, No. 2:22-cv-01233-TLN-AC, 2023 WL 1823896, at
5 *1-2 (E.D. Cal. Feb. 8, 2023).

6 **II. Analysis**

7 As an initial matter, Plaintiff has failed to comply with Federal Rule of Civil
8 Procedure 65(b)(1)(B), which requires counsel to "certif[y] in writing any efforts made
9 to give notice and the reasons why it should not be required." No such certification
10 was included with Plaintiff's Motion.³

11 Even if the Court were inclined to consider the request on the merits, res
12 judicata principles and deficient showings of harm require dismissal. The standard for
13 issuing a TRO is similar to the standard for issuing a preliminary injunction, requiring
14 that the party seeking relief show: (1) likelihood of success on the merits; (2) likelihood
15 of irreparable harm in the absence of preliminary relief; (3) that the balance of equities
16 tip in the movant's favor; and (4) that an injunction is in the public interest. See
17 *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat.
18 Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)); see also *Stuhlbarg Int'l Sales Co. v. John
19 D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001) (noting that the standards for a
20 preliminary injunction and a TRO are "substantially identical").

21 Res judicata (claim preclusion) principles preclude Plaintiff from bringing claims
22 based on the same facts that have been the subject of a prior final judgment on the
23 merits. To establish claim preclusion the following is considered: (1) an identity of
24 claims between the two cases; (2) the existence of a final judgment on the merits; and

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26 ³ The Court notes that Plaintiff has also failed to meet the requirements of Local Rule 231 by neglecting
27 to file (i) a brief on all relevant legal issues presented in the Motion and (ii) a proposed order with a
provision for a bond and notice to Defendants of their right to apply to the Court for modification or
dissolution of the order on two days' notice. L.R. 231; see also L.R. 151; Fed. R. Civ. P. 65(b).

1 (3) identity or privity of the parties. See *Cell Therapeutics, Inc. v. Lash Group, Inc.*, 586
 2 F.3d 1204, 1212 (9th Cir. 2010). Determining whether there is an identity of claims
 3 involves consideration of four factors: (1) whether the two suits arise out of the same
 4 transactional nucleus of facts; (2) whether rights or interests established in the prior
 5 judgment would be destroyed or impaired by prosecution of the second action; (3)
 6 whether the two suits involve infringement of the same right; and (4) whether
 7 substantially the same evidence is presented in the two actions. See *ProShipLine, Inc.*
 8 v. *Aspen Infrastructures, Ltd.*, 609 F.3d 960, 968 (9th Cir. 2010). Whether two suits
 9 arise out of the same transactional nucleus depends upon whether they are related to
 10 the same set of facts and whether they could conveniently be tried together. *Id.*
 11 Reliance on the first factor to dispose of this issue is especially appropriate because
 12 the factor is "outcome determinative." *Id.*

13 Plaintiff's current claims and the claims at issue in No. 2:22-cv-01233-TLN-AC all
 14 arise from the same transactional nucleus of facts: enforcement of an "underground
 15 regulation" by Defendants resulting in Plaintiff being transferred to a NDPF where he
 16 claims he will be harmed by fellow inmates. (Compare Compl. at 6-9; First Amended
 17 Complaint at 2-4, *Love v. Hill*, No. 2:22-cv-01233-TLN-AC, ECF No. 15.) Plaintiff's prior
 18 claims resulted in a final judgment against Plaintiff. *Love*, 2023 WL 1823896, at *1-2.
 19 Further, the parties to this action are the same as in No. 2:22-cv-01233-TLN-AC, with
 20 the exception of one additional Defendant, Defendant Macomber.⁴ Accordingly, the
 21 Court finds each factor in the claim preclusion analysis, and each sub-factor regarding

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 24 ⁴ Although Defendant Macomber was not a party to the prior action, No. 2:22-cv-01233-TLN-AC, he is
 25 likely in privity with the defendants in that action (who are also Defendants here) given that he is the
 26 new Secretary of the California Department of Corrections and Rehabilitation, and the former Secretary,
 27 Defendant Allison, was a named defendant in the prior action and remains a Defendant in this action.
 28 Generally, the Ninth Circuit has held that "when two parties are so closely aligned in interest that one is
 the virtual representative of the other, a claim by or against one will serve to bar the same claim by or
 against the other." *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1405 (9th Cir. 1993). Thus, res judicata
 likely applies to the claims against Defendant Macomber as well.

1 the identity of claims, satisfied. Because Plaintiff's current case will likely be dismissed
2 on res judicata principles, it is unlikely to be successful on the merits.

3 Further, the propriety of a request for injunctive relief hinges on a threat of
4 irreparable injury that must be imminent in nature. See *Caribbean Marine Servs. Co. v.*
5 *Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) ("A plaintiff must do more than merely
6 allege imminent harm sufficient to establish standing; a plaintiff must demonstrate
7 immediate threatened injury as a prerequisite to preliminary injunctive relief.").
8 Although Plaintiff claims that his life will be in danger if he is transferred to a NDPF, he
9 fails to provide evidence that he is in fact set to be transferred. See *id.* at 674
10 ("Speculative injury does not constitute irreparable injury sufficient to warrant granting
11 a preliminary injunction."). At most, Plaintiff's declaration states that transfer to a
12 NDPF was discussed by a classification committee on September 22, 2022 but does
13 not state the outcome of that discussion. (Love Decl. at 2.) Plaintiff also states that
14 although Defendant Mejia told him that he was being transferred to a NDPF, upon
15 arriving at receiving and handling Plaintiff was told that there was no transfer order
16 and was directed to go back to his building. (*Id.* at 2-3.) Thus, it does not appear that
17 there is an order for Plaintiff's transfer to a NDPF or that he is in any danger of being
18 transferred absent such an order. Plaintiff's allegation that Defendant Viera has been
19 harassing him and attempting to force him to transfer to a NDPF does nothing to
20 change this conclusion. (*Id.* at 3.) Moreover, even if Plaintiff has been approved for
21 transfer to a NDPF, his evidence that receiving institution houses former members of
22 his gang, which is the group he identifies as posing a threat to his safety, is conclusory
23 at best.⁵ (*Id.* at 2-3.) Thus, Plaintiff has failed to demonstrate immediate irreparable
24 injury.

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⁵ While Plaintiff states that Defendants are attempting to "force [him to] transfer immediately to an
27 NDPF yard, where known enemies of mine are house [sic], and where my life will be in danger," Plaintiff
28 does not state which facility he believes he is being transferred to, or the basis for his belief that facility
houses former Crip members. (Love Decl. at 2-3.)

1 Since Plaintiff has failed to demonstrate a likelihood of success on the merits or
2 irreparable harm, the Court need not address the balance of equities and public
3 interest factors. See, e.g., *ET Trading, Ltd. v. ClearPlex Direct, LLC*, No. 15-CV-00426-
4 LHK, 2015 WL 913911, at *3 (N.D. Cal. Mar. 2, 2015) ("The Court need not address all
5 of the *Winter* factors because the Court finds that Plaintiff has failed to carry its burden
6 of demonstrating that it would be irreparably harmed absent a temporary restraining
7 order."); *Pom Wonderful LLC v. Pur Bevs. LLC*, No. CV 13-06917-MMM (CWX), 2015
8 WL 10433693, at *18 n. 97 (C.D. Cal. Aug. 6, 2015) ("Because Pom Wonderful has
9 failed to establish a likelihood of irreparable harm, the court need not consider the
10 balance of hardships or the public interest."). In any event, while Plaintiff argues that
11 granting the Motion will serve the public interest, and that any harm to Defendant is
12 outweighed by the injury threatened to Plaintiff, neither piece of evidence Plaintiff
13 cites to support these claims (a "Declaration by Kim McGill" and "Exhibit 'B'") is
14 attached. (Mot. at 2.)

15 **III. Conclusion**

16 For the reasons set forth above, IT IS HEREBY ORDERED Plaintiff's *Ex Parte*
17 Motion for a Temporary Restraining Order and Preliminary Injunction is DENIED. This
18 matter is referred back to the assigned magistrate judge for all further pretrial
19 proceedings.

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21 IT IS SO ORDERED.

22 Dated: May 1, 2023


23 Hon. Daniel J. Calabretta
24 UNITED STATES DISTRICT JUDGE
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